UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANN DARLENE WELLS, as Representative of the Estate of Donald L. Wells, Deceased,	)	
Plaintiff,	)	09 C 1198
v.	)	Judge Kennelly
CITY OF CHICAGO, et al.,	)	
Defendants.	)	

CITY OF CHICAGO'S SUPPLEMENTAL RESPONSE TO PLAINTIFF'S MOTIONS *IN LIMINE* NOS. 3 AND 5

Pursuant to court order, Defendants file the following Supplemental Response to Plaintiff's Motions *in Limine* Nos. 3 and 5:

I. Dr. Childers' Opinion is Not That Mrs. Wells' Delay of Catheterization Caused Mr. Wells' Death

Plaintiff's expert Dr. Joel Kahn opines that because of the Defendants' conduct, it was not possible to perform the cardiac catheterization procedure on Donald Wells until June 10, 2008 – too late to save Wells. Plaintiff now objects to Defendants' expert Dr. Rory Childers testifying that Mrs. Wells declined to allow a cardiac catheterization procedure on May 20 because, she argues, such testimony is tantamount to improperly making her action the proximate cause of the death of Donald Wells. But that is not what Defendants are arguing.

The Defendants seek to admit the fact Mr. Wells' doctors sought to perform cardiac catheterization to rebut Dr. Kahn's opinion that the cardiac catheterization procedure was not possible until June 10. The Defendants do not seek to admit Dr. Childers' opinion to show that

Mrs. Wells' decision was the cause - proximate, intervening, supervening or other - of Mr. Wells' death. The Defendants seek to admit Dr. Childer's opinion to rebut Dr. Kahn's assertion that cardiac catheterization was delayed until June 10 because it was not possible.

And Dr. Kahn's opinion makes this delay highly relevant: Dr. Kahn opines that time was of the essence, that the delay in the cardiac catheterization procedure meant Mr. Wells' heart condition was not diagnosed until Mr. Wells' condition had deteriorated to the point he could not have life-saving bypass surgery.

Contrary to Plaintiff's assertion, Defendants through the opinion of Dr. Childers do not seek to establish that Plaintiff's decision not to proceed with cardiac cateterization of her husband was the proximate cause or a competing cause of her husband's death. Rather, this part of Dr. Childers' opinion is intended to counter the opinion of Plaintiff's retained cardiology expert, Dr. Joel Kahn, that "[b]ecause of medical issues related to the physical trauma Mr. Wells sustained on 4/25/08 *and the delay in the police seeking prompt medical attention/treatment for Mr. Wells*, he was not stable enough to undergo cardiac catheterization until 6/10/08."[1]

Through the opinion of Dr. Kahn and the opinions and anticipated testimony of others, Plaintiff has placed Defendants' alleged delay in providing medical care to Donald Wells at the center of her denial of medical attention claim. According to Dr. Kahn, Defendants' delay in seeking medical attention to Wells caused a "sequence of falling dominos"[2] that led to his death. Dr. Kahn testified that the delay caused Wells to develop profound medical problems (e.g., renal failure, respiratory failure, and "management of all the complications of those two disorders"[3]). Despite abnormal findings from a cardiac stress test administered to Wells on May 3, 2008, which Kahn testified required him to undergo a cardiac catheterization within days, Wells was not stable enough for this procedure due to his "profound and catheterization-delaying medical conditions."[4] When the cardiac catheterization finally was administered to him on June 10, 2008, according to Dr. Kahn, it showed that Wells needed a quadruple bypass, but by then he was not stable enough to undergo such surgery. Wells then developed hypotension (low blood pressure) and died on June 13, 2008. As Dr. Kahn testified in sum,

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[1] Report of Joel K. Kahn, M.D., dated January 24, 2011 (attached as Exh. A), at ¶ 10 (emphasis added).

[2] Deposition of Joel Kahn, M.D., at 101. Excerpts from Dr. Kahn's deposition are attached as Group Exh. B.

> *The delay in the treatment is . . . everything*. That with earlier recognition and transfer to an emergency room and the treatments that were offered, he would have been in the condition – I mean, this is just Cardiology 101. You fail a stress test to this degree – 'cause this was a bad stress test – you get a heart cath within a day or two; you get your surgeon; you get your bypass within a day or two.
>
> Certainly that's all accomplished within a week following May 3rd in . . . the usual scenario. And the *only reason* that scenario wasn't followed there and *a rather unusual delay* of five weeks or so from the stress test to the catheterization, *were all those complications that really stemmed around acute renal failure and its consequences.*[5]

Given Dr. Kahn's opinions that the delay in the treatment of Donald Wells by Defendants "is everything," and especially that the "only reason" for the "rather unusual delay" in administering a cardiac catheterization to Wells is attributable to the conduct of Defendants, Dr.

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[3] *Id.* at 100.

[4] *Id.* at 101.

[5] *Id.* at 111-12 (emphasis added).

Childers should not be barred from testifying that this procedure "was delayed for a period of time during his treatment at Christ Hospital by the decision of his wife, Ann Darlene Wells, not to proceed with this procedure."[6] According to Dr. Childers, and contrary to Dr. Kahn, the catheterization could have been performed earlier in the treatment of Wells "during periods where he was stable, cooperative, and not exhibiting altered mental status."[7] The jury must determine which expert cardiologist to believe as to his assessment of Wells' medical condition from May 3 to June 10, 2008. But Plaintiff's decision to forego a cardiac catherization in favor of "continued medical management only"[8] has been put at issue by Plaintiff's own expert, and therefore is relevant to the jury's ultimate finding of liability or no liability on Plaintiff's denial of medical care claim. Plaintiff's effort to frame this question as one of alternative theories of causation should not distract this Court from the significant probative value of Plaintiff's decision. Accordingly, Defendants are entitled to introduce to the jury evidence of Plaintiff's

[6] Report of Rory W. Childers MD, dated May 24, 2011 (attached as Exh. C) at 8.

[7] *Id.*

[8] *Id.*

actions regarding this procedure.[9] Accordingly, this Court should deny Plaintiff's Motion *in Limine* No. 3.

II. Dr. Levine's opinion need not establish an unprofessional standard of care

Defendants' expert Dr. Jerrold Levine opines that thrombotic thobocytopenic purpura ("TTP") caused Donald Wells' death, and is critical of Wells' treaters at St. Bernard Hospital and Christ Hospital, where Wells was taken after his release from police custody for their failure correctly to diagnose Wells' condition. In turn, plaintiff is critical of Dr. Levine, whose opinion she disparages because it is "contrary to information contained in thousands of pages of medical records,"[10] for two reasons: (1) Defendants have failed to establish that Wells' treaters engaged in medical malpractice, and (2) Defendants through the opinion of Dr. Levine improperly contend that "it was the alleged misdiagnosis and inappropriate medical treatment by the treating physicians that were a proximate cause of Mr. Wells' death."[11] Neither criticism has merit.

Dr. Levine will offer the opinion that the Defendants were not in any way the proximate cause of Wells' death. Rather, other conditions, including Wells' medical treaters' failure to diagnose and treat his TTP, were the sole proximate causes of his death. It is not necessary for the Defendants to prove medical malpractice for this opinion to be relevant or admissible. Rather, the Defendants need show only that another's conduct was the sole proximate cause of Wells' death.[12]

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[9] At the pre-trial conference, Plaintiff cited *Lapidus v. Hahn*, 450 N.E.2d 824 (Ill.App. 1st 1983) in support of her position. Plaintiff's reliance on *Lapidus* is misplaced. *Lapidus* stands for the proposition that an injured plaintiff is not required to undergo risky surgery or other invasive medical treatment to repair damage proximately caused by a tortfeasor. *Id.* at 829. *Lapidus* is inapposite. Unlike *Lapidus*, the medical treatment at issue here – cardiac catheterization – was not caused by Defendants' conduct, as Mr. Wells' cardiac occlusions were a condition of long standing. Plaintiff's expert, Dr. Kahn, says this test was necessary regardless of Defendants' conduct, but was delayed due to their conduct and could not be done until June 10. Mrs. Wells' refusal to permit the cardiac catheterization on May 20, shows it could have been done prior to June 10, as pointed out by Dr. Childers.

[10] Pl.'s Motion *in Limine* No. 5 at 4.

[11] *Id.* at 6.

In *McDonnell*, the Illinois Supreme Court held that a defendant in a medical negligence case could assert a nonparty physician's conduct was the sole proximate cause of the plaintiff's injury without demonstrating the nonparty physician's conduct was professionally negligent. *McDonnell* disputes Plaintiff's insistence that Dr. Levine cannot testify about whether other doctors proximately caused Wells' death unless he establishes they violated the standard of care. In other words, Dr. Levine need not testify about the professional negligence of other treaters; it is enough that he offers expert testimony that Wells' death was proximately caused solely by conduct unattributable to the Defendants. *McDonnell* referred to this as the "empty chair" defense and indicated it would be permitted in cases where a defendant denies that an injury was the result of or caused by defendant's conduct.[13] Thus, *McDonnell* reconfirms its prior ruling in *Leonardi,* that a defendant need not prove a nonparty's conduct was both negligent and the sole proximate cause of the plaintiff's injury.[14] 736 N.E.2d at 1084.

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[12] *See McDonnell v. McPartlin*, 736 N.E.2d 1074, 1079 (Ill. 2000).

[13] *See also Leonardi v. Loyola University,* 168 Ill.2d 83, 92-94 (Ill. 1996) ("empty chair defense" arises when defendant seeks to defeat plaintiff's claim of negligence by establishing proximate cause solely in the acts of others who are not party to the suit).

[14] *See* 736 N.E.2d at 1084.

Although *McDonnell* arose in the context of the proper IPI instruction to give on proximate cause, its ruling is fully applicable to refute Plaintiff's arguments in support of Plaintiff's Motions *in Limine* No. 3 and No. 5:

> [W]here there is some competent evidence that the sole proximate cause of a plaintiff's claimed injury lies in the conduct of someone other than the defendant, the defendant is entitled to have the jury instructed pursuant to the second paragraph of IPI Civil no. 12.04,[15] notwithstanding the absence of evidence tending to establish that the third person's conduct was negligent. That the person is a physician does not change this result.[16]

Under the clear reasoning of the Illinois Supreme Court, Dr. Levine and Dr. Childers may testify about fault conduct attributable to other treaters or other causes of injury without establishing the professional negligence of those treaters, provided Defendants are not apportioning blame among joint tortfeasors, but rather claiming their conduct is not in any way a proximate cause of Wells' death.

In this case, the Defendants argue that their conduct was in no way the proximate cause of Wells' death. Rather, as in *McDonnell*, the Defendants will show that it was the actions of others, including Wells' treating physicians, in failing to diagnose and treat Wells that was the cause of his death. Similarly, IPI 12.05 offers guidance on circumstances when proximate cause is attributable to something other than conduct by persons:

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[15] The second paragraph of 12.04 provides: "However if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant."

[16] *See* 736 N.E.2d at 1085.

> However, if you decide that the sole proximate cause of injury to the plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant.

Plaintiff mistakenly reads these provisions on "sole proximate cause" to mean that there can be only one alternative cause of death or injury to Donald Wells, and if Defendants offer more than one alternative, they are foreclosed from offering any others. But this is nonsensical. "Sole" proximate cause in the context of the IPI and case law does not mean "sole" as in one cause and only one cause. Rather, it means that the sole cause arises from conduct or circumstances that Defendants did not contribute to – solely caused by others. This makes sense because under standard concepts of tort law, if Defendants are "a" proximate cause, it is no defense to say that others also caused injury. It is only a defense to say that injury was caused solely by others. Thus, Defendants here are entitled to offer other causes and alternatives for causation, provided their defense is that something else or others are solely liable, with "solely" meaning to the exclusion of Defendants.

In the final analysis, Plaintiff's Motions *in Limine* Nos. 3 and 5 are attempts to exclude testimony that is harmful to the merits of her case, not to bar inadmissible evidence. When Wells presented at St. Bernard, medical personnel observed that he had a wide range of medical problems. Unlike any of Wells' treaters or Plaintiff's experts, Dr. Levine's diagnosis of Wells can account for this fact. According to Dr. Levine, "TTP can damage virtually every organ in the body,"[17] including the brain, the kidney, the circulatory system, the lungs, and the heart.[18] In addition, "[t]his damage manifests in characteristic ways or syndromes for each organ. Damage can occur in spurts, with quiescent periods in between."[19] With regard to the brain, for example, TMA within its tiny vessels "leads to a waxing and waning impairment of mental capacity. This can range anywhere from mild cognitive impairment and confusion (which may be evident only on careful questioning) to seizure or coma."[20] Thus, Dr. Levine's diagnosis can account for the possibility that at times Donald Wells exhibited sometimes subtle confusion and disorientation, and yet Defendants may not have observed it, thereby going to what notice Defendants would have had that Wells had a serious medical condition which required them to get him medical care sooner than they in fact did.

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[17] Expert Report of Jerrold S. Levine, M.D., dated May 27, 2011 (attached as Exh. D) at ¶ 5.

[18] *Id.* at ¶¶ 5-10.

Conclusion

Thus, for the reasons explained above, this Court should deny Plaintiff's Motions *in Limine* Nos. 3 and 5.

Respectfully submitted,

STEPHEN PATTON
Corporation Counsel of the City of Chicago

By: **/s/ GEORGE J. YAMIN, JR.**
Senior Counsel

30 North LaSalle Street - Suite 900
Chicago, Illinois 60602
(312) 744-0454
Atty. No. 06217483

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[19] *Id.* at ¶ 5.

[20] *Id.* at ¶ 6.